IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 5TH SEPTEMBER 2007 / 14TH BHADRA 1929

SA.No. 544 of 1994(F)

(AGAINST THE DECREE AND JUDGEMENT DATED 22/10/93 IN AS.25/1993 ON THE FILE OF THE SUB COURT OF HALASSERY IN OS.96/1988 OF THE MUNSIF COURT, KUTHUPARAMBA)

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APPELLANTS:APPELLANTS:PLAINTIFFS:

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1. **KUTTIPURATH OMANA, D/O.KUNHIRAMAN, AGED 38 YEARS, HOUSE NO.7/46, PATHIRIYAD AMSOM, DESOM, VENGAD PANCHAYAT, THALASERY.**

2. **SISTER, SHOBHANA, AGED 34 YEARS, D/O.KUNHIRAMAN, RESIIDNG AT ...DO.....**

3. **SISTER DHANALAKSHMI, D/O.KUNHIRAMAN, AGED 30 YEARS, RESIDING AT ....DO....**

BY ADV. SRI.T.A.RAMADASAN

RESPONDENTS: RESPONDENTS:DEFENDANTS:

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1. **MADATHUMPRATH NARAYANAN, S/O.MATHA, AGED 56 YEARS, RESIDNG AT MOKERI AMSOM, BAVODI DESOM, PERALASSRI PANCHAYATH, TELLICHERRY TALUK.**

2. **KOMATH LAKSHMANAN, S/O.KUNHIRAMAN, COOLIE, THAZHEPURA VEEDU, PATHIRIYAD AMSOM DESOM, VENGAD PANCHAYATH, THALASSERY TALUK.**

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*3. KALATHIL BALAN, S/O.APPU, BEEDI WORKER,
PADUVILAYI AMSOM, VENGAD PANCHAYATH,
THALASSERY TALUK. (D I E D).

*THE DEATH OF R3 IS RECORDED AS PER ORDER DTD. 26/11/97 ON MEMO C.F.NO.2124/97.

4. C.P. BALAKRISHNAN, S/O.KUNHAMBU,
KAITHERI PUTHIYEDATH, BEEDI WORKER,
PATHIRIYAD AMSOM DESOM, VENGAD PANCHAYATH,
TELLICHERRY TALUK.

5. MADATHUMPRATH JANU, D/O.KANNAN,
AGED 64 YEARS, RESIDING AT ...DO...DO...

**ADDL.R6 TO R9 ARE IMPLEADED:

R6. SUMA, W/O.KALATHIL BALAN, KALATHIL HOUSE,
5TH WARD, VENGAD PANCHAYATH, PATHIRIYAD P.O.,
THALASSERY.

R7. PRASOON, RESIDING ...DO...DO.....

R8. PRADOSH, ...DO.....

R9. PRAJITHA, ...DO.....

**ADDL.R6 TO R9 ARE IMPLEADED AS LRS OF DECEASED 3RD RESPONDENT VIDE ORDER DTD. 10/03/03 IN C.M.P.NO.2731/98.

BY ADV. SMT.VIDHYA. A.C for R1,R2 to R4
SRI.C.P.KUNJHIKANNAN)
SMT.S.ANITHA) for R5

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 05/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

/TRUE COPY/

P.A.TO JUDGE

KSS

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 544 OF 1994

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DATED THIS THE 5th DAY OF SEPTEMBER, 2007

JUDGMENT

Plaintiffs in O.S.96 of 1988 on the file of Munsiff Court, Kuthuparamba are the appellants. Defendants are the respondents. Appellants instituted the suit seeking a decree for declaration of their title and to set aside Ext.B1 Kuzhikanam assignment deed executed by 5th defendant in favour of first respondent. Plaint schedule properties originally belonged to Kunhiraman, husband of 5th respondent and father of appellants. Under Ext.A1 gift deed, he gifted the properties in favour of his wife and children. Item Nos. 1 and 2 of Ext.A1 gift deed are the plaint schedule properties. Under Ext.B1 Kuzhikanam assignment deed, 5th respondent mother assigned the property in 1964, in favour of first defendant and Balan, who under Ext.B3, entrusted the property in favour of Ayammu and later under Ext.B4 assigned to third respondent. According to appellants, 5th respondent is not entitled to transfer the property under Ext.B1 as Ext.A1 provides that the property shall not be transferred. It was also contended that 5th respondent is an illiterate woman and first respondent and Balan her brothers

obtained Ext.B1 and it is void. Appellant also contended that as permission of the court was not obtained as provided under sub-section 2 of Section 8 of Hindu Minority and Guardian Ship Act, Ext.B1 is void and respondents did not derive any title thereunder and appellants have title under Ext.A1 gift deed and therefore they are entitled to a decree for declaration of title and injunction and also that Ext.B1 is void. Respondents 1 to 4 in their written statement contended that for discharging the kanam debt of Othayoth Narayanan Nambiar the property covered under Ext.B1 was assigned by 5th respondent in favour of first respondent and his brother Balan on 4.7.1964 and eversince then first respondent and Balan were in possession of the property and they did not trespass into the property and as the first respondent and Balan were residing away due to business, the property was given under Melpattam to Kallakandi Ayammu as per Ext.B3 in 1970 and Ayammu was in possession till 1979 and subsequently third respondent under Ext.A4, purchased the property on 3.7.1987 and third respondent is now in possession of the property and appellants are not entitled to the decree sought for. It was contended that Ext.B1 is not void and was validly executed for consideration and is not vitiated.

2. Learned Munsiff, on the evidence of Pws 1 and 2, Dws 1 and 2 and Exts.A1 to A6, and Exts.B1 to B9 dismissed the suit holding that Ext.B1 is not void and in any event, the suit is barred by limitation as it was not instituted within three years from the date of coming to know of execution of Ext.B1. Appellants challenged the decree and judgment before Sub Court, Thalassery in A.S. 25 of 1993. Learned Sub Judge, on reappreciation of evidence, confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. The second appeal was admitted formulating the following substantial questions of law.

1)Whether on the facts and circumstances of the case, courts below were correct in finding that Ext.B1 was a valid document binding on the appellants who were minors.

2) Whether the findings of the courts below that the claim is barred by limitation is sustainable.

3)Whether permission is required to be taken under Section 8 of the Hindu Minority and Guardianship Act for execution of Ext.B1 and whether 5th respondent is the natural guardian of plaintiffs.

4)Whether the findings of courts below that the assignees

respondents 1 and 3 are in possession of the property is correct.

4. Learned counsel appearing for the appellants and contesting respondents were heard. The argument of the learned counsel appearing for appellants is that under Ext.A1 gift deed Kunhiraman gifted the property in favour of 5th respondent wife and appellants daughters with a stipulation that the property shall not be transferred and therefore Ext.A1 assignment deed executed by 5th respondent in contravention of the provisions of Ext.A1 is void. Learned counsel also argued that as under Ext.A1, the properties were transferred to the natural thavazhi consisting of the mother and daughters amd a;; the incidents of thavazhi property is to be attached to the plaint schedule properties and therefore the mother alone is not entitled to transfer the property without obtaining permission of the court as provided under sub-section (2) of Section 8 of the Hindu Minority and Guardianship Act and hence Ext.B1 is void. It was also argued that written statement of 5th respondent shows that she did not voluntarily execute Ext.B1 and it was executed at the instance of first respondent and the brother and hence Ext.B1 is vitiated by fraud and invalid. The learned counsel finally argued that the suit is filed within three years

from the date of coming to know about the existence of Ext.B1 and therefore is within time.

5. Learned counsel appearing for respondents argued that though Ext.A1 provides that the property shall not be alienated it is a restraint on the right in immovable property and therefore the said clause is void and on that ground Ext.B1 cannot be set aside. The learned counsel also aruged that under Ext.A1 the property was given jointly to the mother and minor children and therefore Ext.B1 executed by the natural guardian or on her own behalf cannot be a void document as canvassed by appellant and even if the document is void, the suit should have been instituted within three years from attaining majority and as the suit was not instituted within that period it is barred by time. Learned counsel also argued that even if Article 58 of the Limitation Act is to be applied, evidence establish that the appellants were aware of Ext.B1 executed in 1964 and as the suit was instituted not within the period of three years from the date of coming to know about the document, as rightly found by courts below, the suit is barred by time.

6. It is not disputed that originally plaint schedule properties belonged to the father Kunhiraman. Under Ext.A1 he

gifted the property in favour of 5th respondent wife and appellants daughters who were minors at that time. The mother is admittedly the natural guardian. Under Ext.B1 assignment deed on 14.7.1964, 5th respondent assigned the property on her behalf as well as on behalf of minor children, in favour of first respondent and Balan. The question is whether Ext.B1 is void. As rightly found by first appellate court, by no stretch of imagination Ext.B1 can be termed as void document as held by this court in **Sundeep and another V. Sarojini Nossiar and others** (1990(1) KLJ 625). When 6th respondent has also equal right in the plaint schedule properties and she being a natural guardian assigned the property including her individual share, the document cannot be void document and to transfer the said property, permission as provided under sub-section 2 is not necessary. If that be so, Ext.B1 document is valid as it was executed by the natural guardian of the appellant and therefore on that ground appellants cannot claim title to the properties.

7. Though Ext.A1 provides that the donees are not entitled to transfer the property, it is not disputed that gift deed was accepted and acted upon. Once the gift deed is accepted and acted upon, the donees are the absolute owners of the

properties. In any case, the clause in Ext.A1 restraining the enjoyment of the property including the transfer is therefore void and the said condition does not make it a conditional gift. Ext.A1 does not provide that in the event of the alienation the gift deed is liable to be cancelled. Because of the clause restraining transfer in Ext.A1, it cannot be said that Ext.B1 is void. The evidence establish that even though appellants were minors at the time when Ext.B1 assignment deed was executed, and all the appellants attained majority more than three years prior to the institution of the suit and it was also proved that suit was not instituted within the period of three years from the date of coming to know about the execution of Ext.B1 claim is barred. In such circumstances, courts below rightly held that appellants are not entitled to the declaration of title sought for. There is no merit in the appeal. It is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

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